



OFFICE OF CHIEF COUNSEL FOR ADVOCACY

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

EX PARTE OR LATE FILED

In the Matter of)	
)	CC Docket No. 96-45
Federal-State Joint Board on)	
Universal Service)	

**EX PARTE SUBMISSION BY THE OFFICE OF ADVOCACY OF
THE U.S. SMALL BUSINESS ADMINISTRATION
ON THE JOINT BOARD'S RECOMMENDED DECISION**

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SUMMARY

The Office of Advocacy of the United States Small Business Administration makes the attached written ex parte submission in the Federal Communications Commission's (FCC) proceeding to implement the Universal Service provisions of the Telecommunications Act of 1996.

As previously addressed in the Office of Advocacy's multiple filings in this docket, the Federal - State Joint Board's Recommended Decision raises a number of concerns for small businesses located in rural and high cost areas. The Office of Advocacy is primarily concerned with the Decision's exclusion of major classes of small businesses from the protection of universal service support mechanisms. Neither the Joint Board, in its Recommended Decision, nor the FCC in the Initial Regulatory Flexibility Analysis, adequately considered the economic impact of this recommendation on small entities.

Specifically, the recommendation to restrict support for businesses and residents in rural and high cost areas to only a single connection is contrary to the plain language of the statute, the legislative history, and the underlying public policy of Universal Service -- that consumers across the country have access to telecommunications and information services at rates that are reasonably comparable to those in urban areas. This recommendation, if adopted by the Commission, will have a significant economic impact on two classes of small businesses in rural and high cost areas; 1) small telecommunications providers; and 2) small businesses overall.

Furthermore, the Joint Board's classification of small business as an entity with a single-connection, which has been proposed to determine the level of universal service support in this rule making, is inconsistent with the Small Business Act, 15 U.S.C § 632, as amended. This classification is an inappropriate means to define small business. As required by 1994 amendments to the Small Business Act, any deviation in defining small business from the SBA standard classifications must be approved by the Administrator of the U.S. Small Business Administration.

The Office of Advocacy asserts that all businesses and residents in rural and high cost areas should receive unrestricted universal service support. This policy is consistent with the legislative intent of Congress and is essential for the adequate support and growth of advanced technology in rural communities. It is also the least administratively burdensome option for telecommunications carriers, the FCC, and the Universal Service Fund Administrator.

In the alternative, however, as a means to reduce the significant economic impact on small businesses, the Office of Advocacy proposes that entities with \$5.0 million or less in annual gross receipts be exempt from any reduction of universal service support. Eligible entities under this definition would receive universal service support for an unlimited number of connections. We also propose that all other businesses receive support for up to five (5) lines, providing critical financial support for essential business operations such as fax machines, computer modems, credit card and check approval verification.

In addition, the adverse economic impact on small businesses and small telecommunications carriers would be reduced if their residential customers received support for more than a single-connection. To complement the projected increase in telecommunications and information services in the schools and libraries, it is reasonably foreseeable that there will also be a need to provide school children with similar services in the home. A computer modem will, in the very near future if not today, be essential to rural and high cost residents.

The Office of Advocacy also proposes that institutional users, such as fire and police departments, health care facilities, churches, and governmental entities, receive full universal service support for the number of lines that they deem necessary. Many of these institutional users located in rural areas are classified as "small governmental jurisdictions" as defined by 5 U.S.C. § 601(5) (50,000 population or less), therefore, should receive the same relief as small businesses as defined by the Office of Advocacy in this proposal. The services of institutional users are essential to the public safety, health, and welfare of their communities. Taxpayers already support these entities and the use of telecommunications services is subject to some form of control by their own budgets. Institutional users should not bear the burden of increased costs of basic service, nor be faced with an equally undesirable decision to eliminate lines or reduce workforce, solely because of their geographic location. It is in the public interest to provide full universal support to institutional users.



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**EX PARTE SUBMISSION BY THE OFFICE OF ADVOCACY OF
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ON THE JOINT BOARD'S RECOMMENDED DECISION**

The Office of Advocacy of the United States Small Business Administration makes the following ex parte submission in the above captioned proceeding. The Office of Advocacy was established by Congress in 1976 to represent small business within the federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, representing the views of small business before other federal agencies, developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4).

These ex parte comments expand upon the comments previously filed in this docket by the Office of Advocacy¹ and the California Small Business Association

¹ Comments of the Office of Advocacy, U.S. Small Business Administration, April 12, 1996 and Dec. 19, 1996. Reply Comment and Comment on the IRFA, Jan. 10, 1997; Ex parte letter to Chairman Reed Hundt, Dec. 13, 1996; Ex parte letter to William Caton, Acting Secretary, March 24, 1997 (on behalf of Office of Advocacy and the California Small Business Association).

(CSBA).² These comments elaborate further on the suggestions made therein. Given the urgency of this proceeding and for the convenience of the Commission, the Office of Advocacy has incorporated the necessary justification and data to support these recommendations.

1. Universal Service Support for Multiple Lines is Essential for Small Businesses in Rural and High Cost Areas.

The economic viability of rural America hangs in the balance with the FCC's adoption of rules to implement Universal Service. This is not hyperbole - this is fact.³

Small businesses are the lifeblood of America.⁴ They provide a multitude of services and economic support in the communities in which they serve. In rural areas, this is especially true. Although there may be a primary employer such as a large manufacturing plant in a rural area, small businesses provide the myriad of services and products that are essential to a productive and civilized society; such as grocery stores, cleaners, shoe repair, gas stations, and day care centers. In providing these services, small businesses have embraced modern telecommunications services such as faxes, modems and the Internet to

² Comments of CSBA, Dec. 18, 1996; Ex parte letter to Chairman Reed Hundt, Mar. 10, 1997 (Results of CSBA Telephone Use Poll attached).

³ See Reply Comments of Office of Advocacy, SBA, at 2-6 (citing comments from the docket). See also Letter from Members of United States Senate to Reed Hundt, Chairman, FCC (Mar. 3, 1997); Universal Service: Hearing on Section 254 of the Telecommunications Act of 1996 Before the Senate Committee on Commerce, Science, and Transportation, 105 Cong. (Mar. 12, 1997) (written testimony of Robert B. Ekblad, President, Hot Springs Telephone Co.).

⁴ See The State of Small Business: A Report of The President 1995.

better communicate with their customers and suppliers.⁵ The reality is that small businesses, even those with minimal revenue or employees, have more than a single-connection.

The Office of Advocacy applauds the foresight of Congress to include provisions that increase access to telecommunications and information services for schools, libraries and health care facilities. 47 U.S.C. §§ 254(b)(6), 254 (c)(3). The Commission's efforts to implement these provisions to ensure that America's children will have the best tools necessary to function in a competitive business environment have been noble. There is no doubt about the importance in bringing our schools into the 21st century. However, what good are computers in the classroom and access to the Internet when "Johnny" can't do his homework at home because the cost of a second residential line to support a computer is cost-prohibitive? President William J. Clinton recognized that the need for educated workers is increasing, along with the rewards to education.⁶ What good does increased telecommunications technology and information services serve in the schools when the employers in "Johnny's" community will suffer significant economic hardship - or be technologically inferior to their competitors in urban areas? And last but certainly not least, how can small businesses continue to provide America's greatest gains in employment and the highest percentage of employment⁷ if they are subject to unreasonable increases in the cost of basic telephone service - simply because of their geographic location?

⁵ In California, the typical small business has 4 lines for voice services, dedicated lines for both a fax and modem, one cellular/car telephone, and almost one full line for 800 service. CSBA Telephone Use Poll, at 3.

⁶ The State of Small Business: A Report of The President 1995, at 15.

⁷ Id.

A. The California Small Business Association Poll Illustrates the Significant Economic Impact on Small Business: A Reduction in Number of Lines or a Reduction in Workforce.

The Office of Advocacy supports the conclusions reported in the CSBA Telephone Use Poll that illustrate the potential impact on small businesses if they are subject to certain escalating levels of telephone expenses. The economic impact reported in this survey is also consistent with other analyses in this proceeding.⁸

In brief, the CSBA reports that an increase in monthly telephones charges will have a negative impact on a business' livelihood, the size of its workforce, and/or the number of lines it has. CSBA Telephone Use Poll, at 10. The importance of this data is that it invalidates the Commission's assumption that small businesses will be able to absorb these increased costs, or will be able to pass these costs along to their customers. See Recommended Decision, para. 91. This data also illustrates the magnitude of a small business' dilemma - how much does a small business have to sacrifice in order to afford essential telecommunications service? Small businesses operate at the margins.⁹ Small business in rural and high cost areas must not be unduly disadvantaged, nor should they be faced with an equally undesirable decision between a reduction in profits, service, or workforce simply because of their location.

Some proponents have argued that the increased cost of basic service will be offset by the expected decreases in toll service - resulting in no net difference in total expenses for small businesses. The Office of Advocacy does not agree with this assertion. A

⁸ See, e.g., OPATSCO "Keeping Rural America Connected" Study, at 6-14;

⁹ Comments of the Office of Advocacy, SBA (Dec. 19, 1996), at 12.

business incurs two distinguishable types of costs for telecommunications services: the cost of “operations” and the cost of “productivity.” The cost of operations is the basic cost of *access* to telephone connections, the cost per line and equipment, necessary tools to conduct business. Whereas, the cost of productivity is the purpose and degree that a business will *use* those lines, *i.e.*, the amount of local and long distance calls made or the cost of other services, such as a fax, modem, or credit card verification. The CSBA Telephone Users Poll documents that different groups of industries have varied telecommunications needs, and therefore, different levels of expenses.¹⁰ Clearly, the total cost of telephone service is dependent on the location of the company and the type of industry the small business is engaged in.¹¹ The type of industry group may not necessitate a high level of telephone use (productivity).¹² Not all businesses will have extensive toll costs and thus would not receive reductions that are sufficient to offset higher costs of the basic connection. A small business’ client base may be local and not outside of their toll area.¹³ Furthermore, not every connection may be used to conduct long distance calls. Therefore, a reduction in toll fees will not always offset an increase in the basic cost of service for small businesses. Given these factors, it is uncertain that a purported reduction in toll fees (either due to access charge reform or the elimination of implicit subsidies) will truly result in a net decrease in a small business’ telephone bill.

¹⁰ CSBA Telephone Use Poll, at 5. For example, small businesses in the construction and wholesale trade industries have the highest expenses in combined local service and long distance service, \$3600 and \$1750 per month, respectively. Id. Conversely, small businesses engaged in Finance/Insurance/Real Estate spend only \$375 in combined costs. Id.

¹¹ Id.

¹² For example, Finance/Insurance/Real Estate small businesses spend an average of \$275 per month on local service, but only \$100 per month in long distance. Id.

¹³ Id.

Small businesses cannot rely on this questionable outcome and need continued universal service support for their basic cost of service.

II. If the Commission Deems it Necessary to Restrict the Eligibility for Universal Service Support, The Office of Advocacy Recommends that the Commission use an Appropriate Classification of Small Business.

The Joint Board's recommendation to restrict support for businesses to only a single connection, is contrary with the plain language of the statute that "[c]onsumers in all regions of the Nation, including . . . those in rural, insular, and high cost areas, should have access to telecommunication and information services . . . that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The Joint Board's interpretation that "consumers" does not include businesses is also in conflict with the legislative history,¹⁴ as well as the common meaning of the word as "one who uses a commodity or service."¹⁵ As noted supra, small business are indeed consumers of telecommunications services.

In the alternative, however, if the Commission adopts restrictions or eliminates the amount of universal service support, we recommend that it reduce the significant economic impact on small businesses.

A. The Joint Board's Recommended Decision Is Inconsistent With the Small Business Act by Defining Small Business as an Entity With a Single-Connection.

¹⁴ Id. at Sec. II.A.

¹⁵ Webster's Encyclopedic Unabridged Dictionary of the English Language (1989).

The Joint Board, in effect, has defined a small business as an entity with a single-connection and has proposed to use the definition in this rule making to determine the level of universal service support. The definition and its use are inappropriate for several reasons: 1) the number of connections is an unrealistic means to measure small business size; 2) the number of lines has no correlation to the number of employees nor annual receipts; and 3) is inconsistent with the Small Business Act, 15 U.S.C. § 632, as amended.

Unless specifically authorized by statute, the Commission's adoption of a definition of small business that deviates from the SBA's Standard Industrial Classification regulations set forth in 13 C.F.R. § 121.201, must conform to Section 632(a)(2)(C) of the Small Business Act, as amended, 15 U.S.C. § 632(a)(2)(c). The Act requires that unless specifically authorized by statute, a federal agency may not prescribe a size standard for the purposes of rule making that deviates from the standard definitions set forth by the SBA, unless the alternative size standard is subject to public notice and comment, and approved by the Administrator of the U.S. Small Business Administration. *Id.* Section 254 of the Telecommunications Act does not authorize the use of a size standard for small business, (it refers to all consumers), thus, the Commission must conform to the requirements of the Small Business Act and the procedures set forth in 13 C.F.R. § 201.902.

- B. The Commission Should Adopt the SBA's Refined Definition of Small Businesses, for the Purpose of Universal Service, as an Entity with \$5.0 million or Less in Annual Gross Receipts.**

The CSBA proposed in its ex parte filing dated March 10, 1997, that a small entity be defined as an entity with less than \$10 million or less in annual gross receipts and 100 employees.¹⁶ After extensive review, the SBA is not able to endorse the CSBA's proposal without additional data on telephone usage patterns. Although we fully support CSBA's efforts in setting forth a narrowly-tailored definition of small business for this proceeding, we are unable to establish a rationale that supports this classification of small business.

The definition proposed by the CSBA is very different from SBA's traditional standards, as it combines a random number of employees with a random level of annual receipts for one national standard. The SBA has not had the occasion to formally establish a national size standard. SBA has categorized small businesses by Standard Industrial Classification Codes (SIC Codes), which are based on industry groups and the particular characteristics of that industry. See 13 C.F.R. § 121.201. SBA's SIC Codes are classified by either the maximum number of employees or by maximum annual receipts. These are developed for SBA and federal small business financing and procurement programs, and thus, may not be applicable for all purposes.

The SBA has previously granted approval to the Commission for use of an alternative size standards from the SBA's SIC Codes, however these definitions were specific to a particular area of the communications industry and for a specific purpose, such as competitive bidding for Personal Communications Services licenses.¹⁷

The Office of Advocacy acknowledges that the administration of universal service must be uniform on a national level and encompass all industries. Therefore, the Office of

¹⁶ CSBA Ex parte Letter to Chairman Hundt, at 2.

¹⁷ See In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Dkt. No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532 (1994).

Advocacy and the CSBA agree that SBA's definitions would not be an appropriate measurement of small business in this proceeding. SBA has defined many small businesses by 500 or as high as 1500 employees, which in that particular industry, is considered a small business. See, e.g., 13 C.F.R. § 121.201, SIC Code 2011, (Meat Packing Plants) and SIC Code 4812 (Radiotelephone Communications), respectively. Other types of industries are defined by annual receipts, some as much as \$21.5 million. See, e.g., 13 C.F.R. § 121.201, SIC Code 7812 (Motion Picture and Video Tape production). The financial resources and thus, the economic impact of increased telephone charges, arguably differs for a business with 499 employees compared to one with only 10, and even more so when one industry generates significantly higher annual receipts than another. Moreover, a national standard based in part on employee size would not be appropriate either because certain industries are labor intensive.¹⁸ Such a standard based on a maximum number of employees could unduly prejudice small businesses in an entire industry (and possibly an entire region or State) that are dependent on labor to operate.

It is difficult to determine at what precise level of employees or receipts does the economic impact of increased telephone expenses become significant. SBA Office of Size Standards has not been able to make this correlation to justify CSBA's proposed definition. In fact, statistics on the number of small businesses that meet both the \$10 million and 100 employee benchmarks are not available. Such information is available separately, but not combined.¹⁹

¹⁸ See, e.g., Services Industry group. 1992 Economic Census. U.S. Bureau of the Census. Industry and Employment Size of Firm Report.

¹⁹ In 1992, the reported total of firms in the U.S. was 4,677,075. Of that total, 4,598,105 (98.3%) had less than 100 employees; and 4,576,836 (97.8 %) had less than \$10 million in annual gross receipts. 1992

Given the data available, the Office of Advocacy recommends that a size standard of \$5.0 million or less in annual gross receipts be used to define a small business in this universal service proceeding. This recommendation is based on SBA precedent and the relevancy of annual receipts to the economic impact of increased telephone costs (as opposed to the number of employees). The SBA has established \$5.0 million as the definition for non-manufacturing industries, unless the structural characteristics of a specific industry indicate that a different segment of businesses should be considered as small business. The \$5.0 million size standard is now being used for SBA programs for two-thirds of the non-manufacturing industries. This level has also received broad acceptance by the public as a small business definition for these industries. SBA regulations also define those businesses that cannot be classified into a specific industry (SIC Code 9999) by the \$5.0 million annual receipts benchmark. SBA Table of Size Standards, Revised March 1, 1996. Therefore, for official purposes, this benchmark serves as an "anchor size standard" for classification of small businesses.²⁰ For these reasons, the SBA believes that when a single size standard applicable to all industries is necessary, a \$5.0 million level is, in most cases, both a practical and useful general definition of small business. This is such a case.

National Profile of Small Businesses with Less than \$5.0 Million in Annual Receipts²¹

Total Number of Firms:²² 4,677,075

Economic Census, U.S. Bureau of the Census, Special Tabulation of Census Data under contract to the U.S. Small Business Administration.

²⁰ The SBA Office of Size Standards defines "anchor size standards" by either the \$5.0 million annual gross receipts or 500 employees.

²¹ For a detailed analysis by industry group, please see Appendix B.

²² "Firms" is analogous to parent company. One firm may have multiple establishments or subsidiaries. However, the annual gross receipts of all establishments combined may not exceed \$5.0 million for the firm to qualify as a small business in this proceeding.

# of Firms w/ Less than \$5.0M:	4,437,036
% of Firms w/Less than % \$5.0M:	94.9%
% of Firms w/Total Receipts of \$5.0M:	17.1%
Employee Equivalent Per Firm:	47

Although small businesses with \$5.0 million or less in annual gross revenue represent the majority of the total number of firms in the country, they garner only 17.1% of all total receipts. This distribution of revenue, of course, varies by industry group. SBA's Office of Size Standards also reports that the distribution of businesses by industries in rural areas are comparable to those reported nationally. Therefore, the national statistics reported by the SBA are applicable to rural areas. Unfortunately, the SBA does not have information of the number of small business located in rural or high cost areas.

III. Significant Alternatives that will Minimize the Significant Economic Impact on a Substantial Number of Small Telecommunications Carriers and Small Businesses.

A. Small Business Consumers Should Receive Unrestricted Universal Service Support.

The Office of Advocacy proposes that entities with \$5.0 million or less in annual gross receipts be exempt from any reduction of universal service support. Carriers serving eligible entities under this definition would receive universal service support for an unlimited number of connections. We also propose that all other businesses receive support for up to five (5) lines, providing critical financial support for essential business

operations such as fax machines, computer modems, credit card and check approval verification. The SBA recognizes that the predominant number of businesses in the country are small businesses.²³ This illustrates that the danger of subsidizing many large companies (i.e., Saturn) is greatly reduced. The Office of Advocacy recognizes the need to encourage the growth and success of small businesses. Eliminating all universal service support once a business exceeds \$5.0 million is not an incentive for growth. Providing universal service support for a maximum of five lines provides some support for essential business tools for all businesses in rural and high cost areas.

We concur with the CSBA's recommendation that eligible small businesses must submit self certification, under penalty of perjury, to their telecommunications carriers for their carriers to receive universal service support for those businesses. Ex parte Letter of CSBA, at 2. As noted by CSBA, this procedure is consistent with some state jurisdictions and would also be the least burdensome on the small business and telecommunications carrier. Id.

B. Residential Consumers Should Receive Additional Universal Service Support.

The Office of Advocacy proposes that there be universal support for a second-connection for all residents. In previous filings, the Office of Advocacy did not address the Joint Board's recommendation that residents should also be limited to universal service support for a single connection. It has come to our attention that this restriction also

²³ The majority of firms in the country have less than 100 employees or \$10 million in annual receipts. See supra note 19.

significantly impacts, albeit indirectly, small businesses in their community. Whereas, the ultimate impact on small telecommunications carriers is direct and severe.²⁴ For small business, the proposed loss of support for additional residential lines will result in a household spending discretionary funds to pay for additional lines. This reallocation of funds will greatly impact rural communities. The elimination of support for second homes may also unduly burden tenants (who are responsible for the telephone bill) or persons that commute over long distances and have a second home.

The adverse economic impact on small businesses and small telecommunications carriers would be reduced if their residential customers received support for more than a single-connection. To complement the projected increase in telecommunications and information services in the schools and libraries, it is reasonably foreseeable that there will also be a need to provide school children with similar services in the home. A computer modem will, in the very near future if not today, be essential to rural and high cost residents. Universal service support in the schools will provide even greater rewards for our children when there is adequate support at home, for all Americans.

C. Institutional/Governmental Users in Rural and High Cost Areas Should Receive Unrestricted Support.

The Office of Advocacy has previously stated that institutional users in rural areas will also be adversely affected by the Joint Board's single-connection proposal.²⁵ We propose that institutional users, such as fire and police departments, health care facilities,

²⁴ See, e.g., Comments of the Rural Telephone Coalition: Written Testimony of Hot Springs Telephone Company Before the Senate Commerce Committee, *supra* note 2.

²⁵ Comments of the Office of Advocacy, SBA (Dec. 19, 1996), at 8.

churches, and governmental entities, receive full universal service support for the number of lines that they deem necessary. Many of these institutional users located in rural areas are classified as "small governmental jurisdictions," 5 U.S.C. § 601(5) (less than 50,000 population), therefore, should receive the same relief as small businesses as defined by the SBA in this proposal. The services of institutional users are essential to the public safety, health, and welfare of their communities. Affordable access to telecommunications and information services are necessary in these efforts.²⁶ Taxpayers already support these entities and the use of telecommunications services is subject to some form of control by their own budgets. Institutional users should not bear the burden of increased costs of basic service, nor be faced with an equally undesirable decision to eliminate lines or reduce workforce, solely because of their geographic location.

Therefore, to create uniform and equitable rules, and to ease the administrative burden by the Commission and the Universal Service Fund Administrator, it is in the public interest to provide full universal service support to all institutional users.

IV. Administrative Procedures that will Enable the FCC to Meet the Section 254 Statutory Deadline and Comply with the Small Business Act.

The Office of Advocacy is aware that the Commission faces a statutory deadline of May 8, 1997, to promulgate final rules for the implementation of Section 254. The following administrative procedures are suggested to satisfy the FCC's statutory deadline for final rules and compliance with the Small Business Act.

²⁶ See, e.g., Comments of Stanton Country Health Department (Dec. 24, 1996) (stating that the ability to have access to the Internet is imperative to receive information regarding disease-prevention protocols in a timely manner with other federal, state and local health services).

The Office of Advocacy's recommendation of an appropriate definition for small businesses and proposed level of universal service that they should receive, is a "logical outgrowth" of the Joint Board's recommended decision. See, e.g., Public Service Commission of the District of Columbia v. FCC, 906 F.2d 713 (D.C. Cir. 1990). The Joint Board recognized that small businesses would be impacted by this proceeding and put forth a proposal regarding small businesses in the Recommended Decision for public notice and comment. The record supports our policy arguments and proposed levels of support for small telecommunications carriers, small businesses in general, residents, and institutional users. The procedural problem before the Commission is that the Small Business Act requires that an alternative size standard for small business, can only be "proposed after an opportunity for notice and comment" 15 U.S.C. § 632 (a)(2)(C)(i). If the Commission were to adopt the Office of Advocacy's proposals herein, or a modification, there is an obvious conflict between the Telecommunications Act's statutory deadline and the Small Business Act's requirement for notice and comment prior to a final rule.

The Administrative Procedure Act allows two exceptions to a requirement of notice and comment, one of which is "good cause." 5 U.S.C. § 553(b). There is ample case precedent that supports a suspension of a notice and comment period for "good cause." See, e.g., Petry v. Block, 737 F. 2d 1193 (D.C. Cir. 1984); Mid-Tex Electrical Co-op, Inc. v. FERC, 822 F.2d 1123 (D.C. Cir. 1987). The courts have held that for "good cause," it is sufficient to show that a period of notice and comment was impractical given an agency's implementation of a statute within a deadline imposed by Congress. See Petry, 737 F.2d, at 1193. In this instance, we feel that a showing of "impracticability"

is very strong. There is not “an opportunity” to put the Office of Advocacy’s recommended size standards out for public notice and comment given the imminent statutory deadline.

Please note that the Office of Advocacy does not recommend a complete suspension of the notice and comment period, but only a suspension of the period prior to release of the Report and Order. Final approval by the Administrator of the SBA is still contingent on a review of the public comments, therefore, the Office of Advocacy recommends that the Commission adopt either: 1) an interim rule on only the narrow issue of the small business national size standard; or 2) a final rule on the size standard and contemporaneously, on its own motion, a petition for reconsideration.²⁷ The Commission’s statutory construction of Section 254’s requirement that the Commission “shall complete such proceeding” may determine which option is more appropriate.

The final result of either of the above options, will be to provide an adequate period for public notice and comment on the national size standard issue, an opportunity for the FCC and the SBA to review the comments, and subsequent final approval of a standard by the Administrator of the SBA based on the record. We believe that either option by the Commission, followed by an adequate notice and comment period, will satisfy the statutory mandate of the Small Business Act.

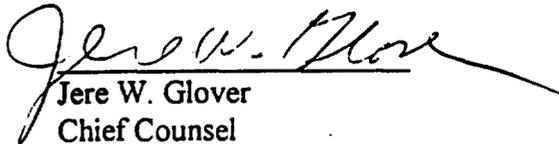
²⁷ The Office of Advocacy distinguishes National Tour Brokers Assoc. v. United States, 591 F.2d 896 (1978), which held that the petition for reconsideration comment period was insufficient to serve as a notice and comment period for a final rule making. Id. at 901-02. In National Tour Brokers, the Interstate Commerce Commission argued that the “final rule constituted ‘notice,’ the period of reconsideration was the ‘comment’ period, and the order denying reconsideration amounted to promulgation of final rules.” Id. at 901. In this universal service proceeding, the purpose for the reconsideration period will be to seek notice and comment and to review the record for final approval by the SBA. We also distinguish the difference between a reconsideration of an issue initiated by the Commission’s own motion, as compared to an outside party filing comments for reconsideration. Furthermore, a post-promulgation comment

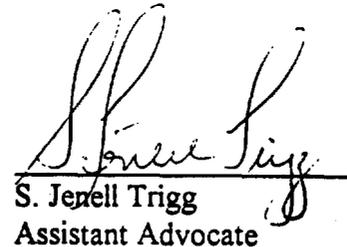
V. Conclusion

In order for the Commission's final rules to come into compliance with the Telecommunications Act of 1996, the Small Business Act, and the Regulatory Flexibility Act, the Office of Advocacy recommends that the Commission modify the Joint Board Recommended Decision to ensure that small entities in rural and high cost areas have access and affordability to telecommunications and information services.

For the foregoing reasons, the Commission should adopt rules consistent with these proposals submitted in this ex parte submission.

Respectfully submitted:


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Assistant Advocate

April 4, 1997

Appendix A

**OFFICE OF SIZE STANDARDS
U.S. SMALL BUSINESS ADMINISTRATION
FIRM SIZE DISTRIBUTION**

Industry Group	Percent of Firms in Industry Group With \$5.0 Million or Less in Receipts	Percent of Receipts in Industry Group of Firms with \$5.0 Million or Less in Receipts	Employee Equivalent to Firm in Industry Group With \$5.0 Million in Receipts
All Industries	94.9	17.1	47
Mining	91.2	8.4	36
Construction	97.2	47.8	36
Manufacturing	88.1	7.3	54
Transportation Communication & Public Utilities	94.9	10.4	55
Wholesale Trade	83.0	10.7	17
Retail Trade	96.4	27.2	48
Finance, Insurance & Real Estate	92.7	8.8	36
Services	98.0	39.8	91

Source: 1992 Economic Census, U.S. Bureau of the Census, Special Tabulation Under Contract to the U.S. Small Business Administration

Data for Construction is based on a weighted sample. Establishments engaged in Agricultural Production, Railroad Transportation, Domestic Services (SIC 8811), government activities, or business activities outside of the U.S. are excluded. Non-profit organizations are included in these statistics.

Not all small businesses are included in the above statistics. Census Bureau methodology does not capture all small businesses. For example, Census data may be based on small businesses that report to the IRS; concentration of population; or by sample measurements.

Appendix B